IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.458 OF 2007

Rashtriya Chemicals and Fertilizers Limited, a Government of India Undertaking incorporated under the Companies Act, 1956, and having its office at Priya Darshini, Eastern Express High Way, Sion(East), Mumbai:400 022. ...Petitioner

V/s.

RCF Employees Union, a Trade Union, registered under the Trade Unions Act, 1926, and having its Registered Office at Tel Rasayan Bhavan, Tilak Road, Dadar, Mumai: 400 014. ...Respondent

Mr.J.P. Cama Sr.Counsel with P.M. Patel with Ms.Swati Deshpande i/b. M/s.Bodhanwala & Co. for Petitioner.
Mr.A.V. Bukhari with A.S. Perizada for Respondent.

CORAM : V.M. KANADE, J.
DATED : 23rd APRIL, 2007.

ORAL JUDGEMENT:

1. Heard learned counsel for the Petitioner and the learned counsel for the Respondent.

2. Rule. Rule is made returnable forthwith by consent of

parties.

3. The Petitioner is challenging the order passed by the Industrial Tribunal, Mumbai dated 19th January, 2007 whereby the Tribunal was pleased to reject the application which was taken out by the Petitioner wherein it is prayed by the Petitioner that the Union-Respondent should lead evidence.

4. Brief facts which are relevant for the purpose of deciding this petition are as under:-

The Petitioner is a Government of India Undertaking registered under the Companies Act, 1956. The majority of shareholding of the said Company is held by the Government of India. Said Company has been established by the Government for the purpose of manufacturing fertilizers in order to meet requirements of farmers in this country. The Respondent is a Trade Union representing employees of the Petitioner. There were settlements between the Petitioner and the employee dated 23rd August, 1985 and 7th February, 1987 and in these settlements, it was resolved that there would be five working days with two weekly

offs in a week. According the Petitioner-Company, this was made on experimental basis though earlier pattern was to have six working days with one holiday in a week.

5. According to the Petitioner, they found that the system of five days working and two days weekly offs did not work properly for the benefit of the Company. Accordingly, the Petitioner gave notice of change dated 25th June, 1998 as required U/s.9A of the Industrial Disputes Act, 1947. By the said notice, intimation was given to the employees that the Petitioner would be reverting back to the original system of six days working with one day weekly off in a week. The Respondent showed their displeasure to the notice of change and therefore conciliation proceedings were initiated by the Commissioner of Labour and ultimately, failure report was submitted by the Conciliation Officer and the Central Government, thereafter refused to refer the matter for adjudication. The Respondent filed Writ Petition in this court and interim relief was refused by this Court though Writ Petition was admitted. In the Apex Court, it came to be dismissed on 27th October, 2001 and thereafter change was given effect to from 1st August, 2001.

6. Thereafter, the Respondent filed complaint of unfair labour practice being Complaint(UL)No.590 of 2001 and the application for interim stay was filed. However, said application was rejected by the Industrial Court. In the meantime, Division Bench of this Court in Writ Petition No.615/2000 has directed the Central Government to make reference to the Central Government Industrial Tribunal. Accordingly, following reference was made which reads as under:-

> "Whether the action of the management of Rashtriya Chemicals and Fertilizers Ltd. and Thal Unit in increasing the five days working week to a six days working week and changing working hours is justified? If not, what reliefs are the workmen entitled to?"

7. Thereafter, written statement was filed by the Petitioner-Company. The Petitioner made an application that the Central Government Industrial Tribunal did have jurisdiction to decide reference as the Appropriate Government was the State Government and not the Central Government. The CGIT held the Reference was properly made by the Central Government and it was not hit by Section 59 of the Act. It also directed the parties to

lead evidence. The Petitioner challenged this order by filing a writ petition in this Court. This writ petition was decided by this court by judgment and order dated 18th August, 2006 and in the said order, it was held that the State Government was competent to make reference U/s.10 of the said Act and the Court, however, directed the State Government to refer the dispute to the Industrial Tribunal and the papers and proceedings which are pending before the Central Government Industrial Tribunal be transferred to the Industrial Tribunal. When the matter was pending before the Central Government Industrial Tribunal, an order was passed by the said Tribunal dated 22nd July, 2004 directing the Petitioner-Company to lead evidence in the first instance. After matter was referred to the State Government, a fresh application was filed by the Petitioner requesting the Tribunal to direct the Respondent to lead evidence first. It was contended in the said application that the order passed by the Tribunal dated 22nd July, 2004 was not binding on the Tribunal since order passed by the Central Government Industrial Tribunal dated 22nd July, 2004 was nullity and had no jurisdiction for the same.

8. This application was decided by the Industrial Court by its order dated 19/01/2007 and held that burden is cast on the Petitioner to justify its action and therefore, directed the Petitioner to lead evidence in the first instance.

9. The Petitioner is aggrieved by the aforesaid order and has filed this writ petition. It must also be pointed out that two applications were filed by the Petitioner for seeking clarification of the order passed by this court in writ petition No.2338 of 2003. In the first order dated 7th December, 2006 (Coram: Dr.D.Y. Chandrachud, J.) was pleased to pass following order:-

> "P.C.:
>
> Called for speaking to the Minutes of the order dated 18th August 2006. No clarification of the order is necessary on the question of leading evidence since liberty has been granted to the Petitioner to apply before the Industrial Tribunal to lead evidence"

Thereafter, another application was preferred for speaking to the Minutes and by order dated 21st March, 2007, this court was pleased to pass following order:-

> "P.C.:

> Called for speaking to the Minutes of the order dated 18th August, 2006. The order of this Court is clear and does not suffer from any ambiguity. There is no occasion for this Court to clarify its order based on what the Petitioner contends is an erroneous reading of the order of this Court by the Tribunal. Parties, if they are aggrieved by any order passed by the Industrial Court in the pending reference, would be at liberty to espouse such remedies as are available in law"

Thereafter, impugned order was passed by the Industrial Tribunal.

10. Learned Senior Counsel for the Petitioner invited my attention to the Judgment and order passed by this Court in Writ Petition No.2338/2003 dated 18th August, 2006 and submitted that this Court in the said Judgment and order had held that Appropriate Government was the State Government and not the Central Government and therefore, order, if any, which was passed by the Central Government Industrial Tribunal was nullity since the Tribunal did not have jurisdiction to entertain the said reference. He further submitted that order passed by the Tribunal dated 22nd July,

2004, directing the Petitioner-Company to lead evidence was not binding on the Industrial Tribunal. He further submitted that though record and proceedings were transferred by order of this court while deciding writ petition No.2338/2003, it was obvious that the proceedings were to start afresh before the Industrial Tribunal. He invited my attention to the direction given by this Court in the said order and more particularly in para 16 of the said judgment. He further submitted that the Tribunal had erred in relying on the previous order passed by the Tribunal dated 22/07/2004. He further submitted that the Tribunal further erred in holding that there was no observation made by the Hon'ble High Court that the evidence led before the Tribunal should be excluded from the consideration of this Court. He further submitted that the Tribunal further erred in relying on the phraseology used in the order of reference while coming to the conclusion that the burden was on the Petitioner-Company to justify its action. He invited my attention to the Division Bench of this Court in the case of **Narang Latex and Dispersions Pvt. Ltd V/s. Mrs.S.V. Suvarna and anr. reported in 1994(68) F.L.R. Page 1028**. He submitted that Division Bench of

this Court had held that burden of proof lay on the workman and not on the management and that therefore, workman was under an obligation to lead the evidence first. He invited my attention to the observations made by the Division Bench of this Court and submitted that ratio of the said judgment was squarely applicable to the facts of the present case. He further relied on the judgment of the Supreme Court in the case of **Ashok Kumar Sahu Vs. Union of India, reported in (2006)7 S.C.J. at 235** in support of his contention that the order passed by the authority without jurisdiction would be non-est in the eyes of law. He further submitted that order passed by the Central Government Industrial Tribunal was not binding on the Industrial Tribunal and therefore it can not act as res judicata since earlier order passed by the Central Government Industrial Tribunal has no jurisdiction and therefore, it was nullity in the eyes of law.

11. Learned counsel appearing on behalf of the Respondent on the other hand, submitted that the ratio of the judgment in the case of **Narang Latex and Dispersions Pvt. Ltd(Supra)** was not applicable to the facts of the present case. He tried to distinguish

such judgment by pointing out that the facts that the observations which were made by the Division Bench by this Court were made in the context of and with reference to the subject matter of the said case. He submitted that in the said case question was regarding fairness or otherwise of the domestic inquiry which had culminated in order of dismissal which was passed against the workman and therefore, in that context the Division Bench had rightly held that the burden was on the workman to prove that inquiry was not fair and proper. He submitted that reliance was placed by the Division Bench in the case decided by the Allahabad High Court and also **Shankar Chaudhary V Britania Biscuits Co. Ltd.** of the Supreme Court. These judgments are not applicable to the facts of the present case.

12. In my view submissions made by the learned counsel appearing on behalf of the Petitioner can not be accepted. It is no doubt true that that order which was passed by the Central Government Industrial Tribunal dated 22nd July, 2004 was not binding on the Industrial Tribunal. It is well settled position in law that any order passed by the Court which has no jurisdiction is

nullity to the extent submissions made by the learned counsel for the Petitioner that the Industrial Tribunal had erred in relying on the earlier order of the Central Government Industrial Tribunal will have to be accepted. However, fact remains that while considering question of burden of proof, Court has to consider the facts of the case while deciding the question on whom burden of proof lies. It is no doubt true that mere phraseology used in the reference will not determine on whom burden of proof lies. Each case, therefore, has to be decided on its own facts and circumstances and that can not be in strait jacket formula which can be laid down to decide burden of proof. Further it has to be kept in mind that the concept of burden of proof and onus of proof are distinct and separate though sometimes these two interpretations are erroneously treated as synonymous. Discretion is vested in the Court to decide which party should lead evidence first after court takes into consideration pleadings of the parties. It is well settled position that the party which makes positive assertion has to prove said fact and consequently has to lead evidence in respect of proof of the said fact. Therefore, what has to be seen is not the form but the

substance of the allegations and not the grammatical context in which assertion is made. In the present case, the Petitioner-Company had issued notice of change U/s.9A of the Industrial Dispute Act 1947, disclosing its intention of making change in the working pattern of the workmen and accordingly from five days in week and two days weekly offs change was made for six days working and one day weekly off. There were settlements made in between the Petitioner and the workmen in which both the parties had agreed that working pattern would be five days working and two days weekly offs. In the light of this pleadings therefore, burden was cast on the Petitioner-Company to establish why they felt that said change was essential though there were settlements earlier between the parties and under these circumstances, in my view, the Tribunal was justified in directing the Petitioner-Company to lead the evidence first, since the burden of proof consequently was on the Petitioner-Company to establish this fact. Since the Petitioner-Company had made a positive assertion that it was essential to change working pattern from five days a week to six days a week. In my view, ratio of the judgment on which reliance

was placed by the learned counsel for the Petitioner-Company will not apply to the facts of the present case. The Hon'ble Supreme Court in catena of cases has held that ratio of case can not be read as provisions in the Statute and while considering ratio of the judgment, facts and subject matter in the said case has to be taken into consideration. The Hon'ble Apex Court in the case of **M/s.Zee Tele Films Ltd. V. Union of India reported in AIR 2005 SC 2677** has observed in para Nos.275 to 278 as under:-

> "275. Are we bound hands and feet by Pradeep Kumar Biswas(supra)? The answer to the question must be found in the law of precedent. A decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. [See Punjab National Bank v. R.L. Vaid and Others, (2004) 7 SCC 698]

276. Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and others v. Akhil Gujarat Pravasi V.S. Mahamandal and Others [AIR 2004 SC 3894] wherein this Court held :

"....it is trite that any observation made during the course of reasoning n a judgment should not be read divorced from the context in which they were used."

277. It is further well-settled that a decision is not an authority for the proposition which did not fall for its consideration.

278. It is also a trite law that a point not raised before a Court would not be an authority on the said question."

13. In the light of ratio of the judgment of the Supreme Court on the law of precedent it will have to be examined where the ratio laid down by the Division Bench of this Court, on which reliance is placed by the learned counsel for the Petitioner, is applicable to the facts of the present case. In the said case which was decided by the Division Bench of this court the facts were that the Management had held the domestic inquiry against the employee and on the basis of findings which were given in the domestic inquiry, passed

an order of dismissal against the workman which was challenged by the workman in the Labour Court and in the said proceedings, Labour Court directed the Company to lead evidence first on the issue of fairness of the employee. This order was challenged by the Company before the Single Judge of this Court. Writ petition was dismissed by the Single Judge of this Court and against the said order Letters Patent Appeal was filed before the Division Bench. Division Bench relied on the judgment of the Allahabad High Court in case of **Airtech Private Ltd. V/s. State of U.P. and Ors. reported in 1984(49)FLR 38**. In this case, Allahabad High Court had relied on the observations made by the Hon'ble Apex Court in the case of **Shankar Chaudhary V/s. Britania Biscuits Co. Ltd.** Division Bench also relied on the judgment of Division Bench of this court in the case of **V.N.S. Engineering and Services Company and Industrial Tribunal, Goa, Daman and Diu and another reported in 1987(II) LLN 968**. Division Bench after quoting observations which were made by the Allahabad High Court and Division Bench of this court, came to the conclusion that the ratio of the aforesaid judgment would apply and under the said

circumstances held that the employee should lead evidence first. It is to be noted that in those cases essential question before court was in respect of fairness or otherwise of the domestic inquiry. In the said context, courts observed that parties challenging validity of the order must prove whether it is legal or otherwise and therefore, in that context, it observed that if no evidence is produced by party invoking jurisdiction of the court, said dispute would result in its failure. In my view, these observations, therefore, which are made by the Division Bench will have to be read in the context of the said matter of the dispute which arose in the said case and observation, therefore, will not apply to the facts of the present case. In view of this, there is no merit in submission made by the learned counsel for the Petitioner. Writ Petition is, accordingly dismissed. Rule is discharged. Under the circumstances, there shall be no order as to costs.

V.M. KANADE, J.